

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1419

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DOCKET
NO. 73-1291

-vs.-

ROBERT LEE DENSON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT
ON APPEAL

To be argued by:

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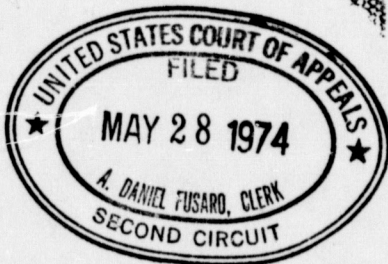


TABLE OF CONTENTS

	Page
I. Questions Presented	1
II. Statement of the Case	1
III. Argument	
A. The jury verdict was against the weight of the evidence	3
B. It was error to deny defendant's proposed instruction on identification	9
C. Conclusion	9.

TABLE OF CASES

<u>CASE</u>	<u>Page</u>
<u>Jones v. United States</u> , 361 F.2d 537 (D.C. Cir. 1966).	8
<u>Macklin v. United States</u> , 409 F.2d 174 (D.C. Cir. 1969)	9
<u>United States v. Barber</u> , 442 F.2d 517 (3d Cir. 1971).	9
<u>United States v. Evans</u> , 484 F.2d 1178 (2d Cir. 1973)	9
<u>United States v. Fernandez (I)</u> , 456 F.2d 638 (2d Cir. 1972).	9
<u>United States v. Telfaire</u> , 469 F.2d 552 (D.C. Cir. 1972).	9

I. QUESTIONS PRESENTED

A. Whether the jury verdict was against the weight of the evidence.

B. Whether the trial court erred in failing to give defendant's proposed identification instruction.

II. STATEMENT OF THE CASE

This appeal is from a judgment of March 29, 1974 convicting the defendant-appellant of two counts of robbery (18 U.S.C. §§2, 2113(a), (d)). A trial was held in Utica, New York, between February 11 and February 20, 1974 before Hon. Lloyd F. MacMahon, United States Judge, sitting by designation, and a jury.

The defendant and two others, Raymond Jones and Calvin Broadwater, were indicted in connection with the robbery of a branch of the First Trust and Deposit Company, Syracuse, New York on September 12, 1973. At the trial, there was no issue that a robbery had been committed at the time and place alleged. Jones and Broadwater had previously pled guilty before Hon. Edmund Port, United States Judge. The sole issue was the identification of the defendant-appellant as one of the perpetrators of the crime.

The only identification witness was Alton Isaac (A 51-116). The strongest aspect of his testimony was his statement that the defendant, in the company of two other black males, approached him in front of the First Trust & Deposit Co., spoke to him from a distance of about three feet, and asked him to tap on a window if he saw any police officers because it was the intention of the three black males to rob the bank.

Mary R. Tallerico (A 23-39) and Christine Tzetzis (A 39-45) testified as to the occurrence of the robbery.

Calvin Broadwater (A 121-136) and Raymond Jones (A 163-169), who had previously entered pleas of guilty, both testified that the defendant-appellant had not been their accomplice.

Douglas S. Bullock (A 140-147) testified that defendant-appellant purchased an automobile from him shortly after the robbery for the sum of \$2,000.00, which was paid in cash.

Henry D. Breland (A 191-201) and Jeffrey Houston (A 201-209) testified that they were in the company of the defendant-appellant and Broadwater shortly after the robbery.

Rosa Lee Armster (A 214-243) and Dora Mae Bolden (A 278-283) testified that Jones and the defendant-appellant had been in their company early on September 12, 1973 at which time Jones spoke of robbing a bank.

Special Agent Savage (A 147-151, 158-161) testified to property confiscated from the defendant when arrested.

Frank Sardino (A 243-252, 274-278) and Richard Walsh (A 254-259), both police officers, called to impeach Jones, testified that Jones, on September 14, 1973, implicated Denson.

Randall Walker (A 284-291) identified a cash sales slip from his clothing store in Detroit, Michigan.

A stipulation was presented (A 156-157) to the effect that defendant-appellant paid a substantial traffic fine on September 20, 1973.

The defendant did not testify. Defense witnesses were Paul J. Weatherup (A 175-191) who testified to a prior incorrect description of the defendant-appellant and Andrew S. Mrozienski (A 294-307), a police officer who admitted that, at a preliminary hearing held in the City Court of Syracuse on September 26, 1973, though he knew of the alleged implication of defendant-appellant by Jones, he said nothing of it.

III. ARGUMENT

A. The jury verdict was against the weight of the evidence.

The government's case was built around the testimony of Alton Isaac. Peripheral to his testimony was the testimony of several witnesses who, viewed even in the

light most favorable to the government's case, established, at best, that defendant-appellant was in the company of each of the confessed bank robbers on September 12, 1973, possessed a large sum of cash that afternoon and over a week later. The confessed bank robbers both testified that the defendant-appellant did not participate in the robbery. Two police officers were called to impeach Jones and Broadwater. It is submitted that each of the government witnesses was discredited and impeached as to the material portions of their direct testimony and often gave new evidence that favored the defendant-appellant.

The testimony of Alton Isaac was characterized by inconsistencies and flaws. On direct examination he testified that the defendant got within three feet of him (A-55) and identified him in court (A-60). But he could not recall how long he looked at him (A 55-56). He could not remember if the defendant had anything on his face (A-60). He acknowledged that he had seen the defendant previously on only one occasion while playing basketball in a park (A 56) and he stated he had never seen Jones and Broadwater with the defendant before (A 56, 57). He described the defendant as about six feet tall with large shoulders (A-59). He stated that on September 12, 1973, when interrogated, he picked out the defendant's photograph (A 65-70).

On cross examination, Isaac admitted to numerous preparatory meetings with police officers, FBI agents, and government attorneys (A 70-75) during which times he was shown a photo of the defendant. He admitted to having agreed to the request to watch for police officers and leaving without reporting the incident (A 85-86).

He stated that his recollection of events was positive when he first spoke with FBI agents (A-88). However, he did not contest the validity of his signed statement to the FBI (A 106, 107) and his sworn statement to the Syracuse Police Department (A 89, 90) in which he described the defendant as five feet seven inches tall. He acknowledged that, in sworn testimony before the Grand Jury, he had reaffirmed the validity of his FBI statement.

He admitted that his recollections at trial were less accurate than when he was first interrogated (A 103).

Despite his several previous descriptions of the defendant as a short person like himself, he was forced to admit, when placed next to him in the court room that the defendant was substantially taller than him (A 111, 112).

Whether viewed as a prior sworn contradictory statement or merely as a major inconsistency, it is clear that Isaac's identification of the defendant was suspect.

Isaac was also impeached in the crucial question of his prior knowledge of the three bank robbers who approached him. Despite his direct testimony that he had only seen the defendant, he admitted to having given sworn testimony before the Grand Jury in which he stated he had seen all three bank robbers (A 81, 82, 87).

Despite his positive identification of the defendant on redirect examination, in response to a leading question (A 115, 116), Isaac nevertheless acknowledged that his testimony was confused (A 87, 88).

Rosa Lee Armster, testifying under a promise to not prosecute (A 235, 236), testified on direct examination that when Jones and the defendant had been at her home early on September 12, 1973, Jones stated "we are going to rob a bank" (A 215). Jones had used the word "we." She acknowledged that she never gave a statement until her Grand Jury testimony. (A 230). And, on cross examination she hesitated as to the use of that word (A 230-232). Finally, her memory on such facts as clothing worn, etc., was non existent (A 232-233).

Dora Mae Bolden, testifying to the same conversation, acknowledged that Jones had said "he was going to rob a bank." (A 281).

Henry Breland and Jeffrey Houston testified to picking up the defendant and Broadwater in the late afternoon

of September 12, 1973. However, they both acknowledged they were not interviewed by FBI agents until long after the incident and that the date had been suggested to them (A 196-201; 205-208).

The two police officers who were called to impeach Jones and Broadwater were themselves discredited. Mr. Sardino was quick to identify an Exhibit handed him by the Assistant U. S. Attorney as the exact photograph used many months earlier by Jones to implicate the defendant (A 247). This photograph was one of hundreds selected by the prosecution (A 35). Yet on cross examination, after an entire weekend to search his files, Mr. Sardino was unable to produce such a photograph from the records of the Syracuse Police Department (A 276). Further, though careful records of the investigation were maintained, there was no record of so important an event as the accusation made by Jones (A 251). Mr. Walsh also testified concerning Jones' implication of the defendant (A 255), but without any records to support his recollection (A 267).

Paul Weatherup, previously a government witness, was called by the defense. He acknowledged that his first description of the third man in the robbery was of a man

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substantially smaller than the defendant. (A 183-184).

He also admitted to first describing the defendant as smaller than Broadwater, then later retracting this description when confronted by the defendant and Broadwater while testifying as a prosecution witness in the City Court of Syracuse (A 184).

Also called as a defense witness, Mr. Mrozienski acknowledged that he had been called earlier by the prosecution but not used as a witness (A 295). He further stated that, though he learned from Mr. Sardino that Jones had implicated the defendant (A 297), he made no record of it (A 298) and failed to mention it in his preliminary hearing testimony (A 298).

It is beyond question that the prosecution must sustain the burden of proving beyond a reasonable doubt every essential element of the crime charged; this burden includes proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged. Jones v. United States, 367 F.2d 537 (D.C.Cir. 1966). Indeed, the identification of the defendant as the perpetrator of the crime is "one of the most important issues of a case". United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). It is respectfully submitted that the evidence in this case is riddled with reasonable doubt, and that the government has not sustained its burden of proof.

B. It was error to deny defendant's proposed instruction on identification.

Identification instructions must be given in cases where identity is in issue and the defendant requests such a charge. See, e.g. Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969). The degree of elaboration on the dangers of misidentification and factors to be considered would seem to be proportional to the dangers attendant in the particular case. See United States v. Fernandez (I), 456 F.2d 638 (2d Cir. 1972).

In this case, in view of the weak identification testimony, defendant offered a proposed instruction adapted from United States v. Barber, 442 F.2d 517 (3d Cir. 1971). Although United States v. Evans, 484 F.2d 1178 (2d Cir. 1973), held that it was not error to refuse to give an additional identification charge, the court did suggest that such a charge would be warranted given the proper circumstances. It is submitted that the identification testimony, cited at length in the previous section of this brief, was such that the charge adapted from United States v. Barber, Supra, should have been given.

IV. CONCLUSION

Appellant respectfully requests that the conviction

be vacated and a new trial ordered.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT LEE DENSON, JR.,

Defendant

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF CAYUGA) SS.:

LEE S. MICHAELS, being duly sworn, deposes and says:
That I am not a party to the action, am over 18 years of age,
and reside at E. Genesee St. Rd., Auburn, N.Y.
That on the 24th day of May, 1974, I served a copy of the
within Brief and Appendix on the Hon. James M. Sullivan,
United States Attorney for the Northern District of New York,
Attorney for the Government at the United States Court House
and Post Office, Syracuse, New York, the address designated by
said attorney for that purpose, by depositing a true copy of
same enclosed in a postpaid properly addressed wrapper in
an official depository under the exclusive care and custody
of the United States Post Office Department within New York
State.

Lee S. Michaels

LEE S. MICHAELS

Sworn to before me this
24th day of May, 1974.

Michael A. Winberg
Notary Public

Cayuga County #1410

My Comm'n expires Mar. 30, 1976

